Supreme Court, U.S.
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(3)

NO. 91-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN A. KOCZAK

Petitioner

v.

JIM SMITH,
Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH,
Attorney General, State of Florida
CHARLES WHITEHEAD,
Chairman Florida Democratic Party;
JOHN W. VOGT,
President, Florida Senate;
JON MILLS,
Speaker, Florida House of Representatives

Respondents

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Appeals Court for the Eleventh Circuit upholding Florida Statute Chapter 103, Section 103.101 (2) (a) and (b) which provides for the exclusive selection for primary ballot access of candidates acceptable to a statutory committee and which provides no alternate access whatsoever to the Florida presidential primary ballot is in conflict with prior Supreme Court decisions, including *Lubin v. Panish*, 415 U.S. 709 (1974)?

2. Whether, the Florida Statute Chapter 103, Section 103.101(2)(a) and (b), is constitutional in light of Supreme Court decisions, including *Democratic Party of the United States v. Wisconsin,*101 S. Ct. 1010 (1981), 450 U.S. 107 (1981) and *Tashjian v. Republican Party,* 107 S. Ct. 544 (1986) prohibiting state action and intervention in partisan political party internal affairs?

3. Whether, there being no alternative access to the ballot, the actions of the Presidential Candidate Selection Committee are state action as a "pre-primary" held by a small statutory "insider" group accountable only to itself in violation of the First and Fourteenth Amendments and the Civil Rights laws?

4. Whether the Florida Attorney General, by officially representing in the courts the Speaker of the Florida House of Representatives and the President of the Senate as

members of the Presidential Candidate Selection Committee establishes and confirms that the participation of these members of the State Legislature constitute state action of that Committee?

5. Whether the activities of the Florida Presidential Candidate Selection Committee (composed of the Secretary of State, a member of the executive branch; the President of the Senate and the Speaker of the House of Representatives, members of the legislative branch; and a member of a partisan political party) are state actions violating the separation of powers clauses of the United States and Florida constitutions?

6. Whether the Florida Legislature can constitutionally create for, or delegate to, any of its own members, the right to intervene ex officio as legislators in internal partisan political party affairs to approve or disapprove the names of candidates and delegates for a presidential primary election?

7. Whether the United States District Court for the Northern District of Florida, Tallahassee Division, and the United States Appeals Court for the Eleventh Circuit rendered judgments in conflict with United States Supreme Court decisions and departed from the usual course of judicial proceedings by failing to give close scrutiny to the facts in this case?

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INTERESTED PARTIES

To assist in the consideration of this appeal and pursuant to Rule 14 of the Supreme Court of the United States, there appear below the names and titles of the parties who were involved in the events leading to this case and have an interest in this outcome of this petition:

JAMES SMITH, Secretary of State, State of Florida

ROBERT A. BUTTERWORTH, Florida Attorney General

JOHN W. VOGT, President, Florida Senate

JON MILLS, Speaker, Florida House of Representatives

CHARLES WHITEHEAD, Chairman, Florida Democratic Party

GEORGE L. WAAS, Attorney with the office of the Florida Attorney General, Civil Division, Counsel for Appellee Smith, and Defendants Vogt and Mills

JOHN H. FRENCH, JR., Counsel for Defendant Whitehead

STEPHEN A. KOCZAK, Plaintiff/Appellant/ Petitioner

THE HONORABLE MAURICE M. PAUL, United States District Court Judge, Tallahassee Division, Northern District of Florida

ELEVENTH CIRCUIT JUDGES EDMONDSON, BIRCH and DUBINA

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STATEMENT OF THE CASE

Petitioner invites the attention of the Justices of this Court to the most recent maneuver by the Respondents to alter and distort radically the presentation, through suppression, of the facts and the law so as to deceive the members of this Court as to the realities underlying this Petition.

Not wishing to address the seven "QUESTIONS PRESENTED", the Respondents have undertaken to evade all the issues raised in those "QUESTIONS PRESENTED". They have chosen, instead, to confront the court with a set of extraordinary circumstances resulting in the falsification of the procession, priority and hierarchy of their legal status as Respondents before this Court.

Four of the five respondents named by Petitioner, precisely those four who had appeared as Appellees before the Appeals Court, Eleventh Circuit, have decided not to appear before this Court. They want the Court to condone their claim that they do not exist as Respondents, that they have nothing to do with this case. Yet they have chosen to do so without an express waiver to appear. They have decided to let the time expire, as if thereby they were exculpated by oblivion from all their violations of the Constitutional rights of the Petitioner and of the generality of the members of the Florida Democratic Party.

The one Respondent who has come forward, the State Chairman of the Florida Democratic Party, did **not** appear as an Appellee before the Appeals Court Eleventh Circuit. Moreover that Respondent is involved only incidentally in most of the issues presented by this Petition. Thus the central issues of this Petition are being circumvented by the Respondents and other issues totally unrelated, fictitious and extraneous are being substituted by intention and design.

In light of these circumstances, Petitioner raises the question whether there exists an understanding and a collaboration between the office of the Florida Attorney General and Esquire Mark S. Levine to reverse their roles? That is, is there an agreement among them to evade and avoid the issues before this Court by replacing the office of the Department of Legal Affairs of the State of Florida, representing the four principal Respondents ,with the attorney for the Florida Democratic Party as the sole Respondent? Is this to conceal from the Supreme Court the roles of the four principal Respondents?

This would appear to be the case.

For example, in the Brief in Opposition submitted by Esquire Levine, there is not a single reference either to the President of the Florida Senate, to the Speaker of the Florida House of Representatives nor even to the Secretary of State of the State of Florida nor to the Florida Attorney General.

This extraordinary omission, a major tour de force over more than twenty pages of text, was accomplished despite the fact that the Florida Statute at issue, cited by both

the Petitioner and by the Attorney for the Florida Democratic Party explicitly names four Florida State officials as members of the Presidential Candidate Selection Committee!! Yet, in his entire Brief, Esquire Levine avoids taking note of the explicit language of the very statute he pretends to defend.

CENTRALITY OF THE "QUESTIONS PRESENTED"

Petitioner reiterates and stresses that four of the seven "QUESTIONS PRESENTED" by him relate specifically and exclusively to the activities of the Florida State officials whose conduct involved interference with, and intrusion into, the rights of the general membership of the Florida Democratic Party. The remaining three "QUESTIONS PRESENTED" are rooted in these four.

In formulating his complaints and framing his "QUESTIONS PRESENTED", Petitioner has sought to have the Courts treat his litigation, now in its fifth year, as an effort to define the boundaries between the following categories of legal considerations: the rights of the State as such; the rights of officers of the State (such as members of Legislatures) to act as automatic ex officio party leaders in deciding who may and may not have ballot access; the appropriate rights of any temporary but internally elected political party leadership (such as the State Chairman of the Florida Democratic Party) over against the rights of the party general membership in determining who has primary election ballot access so that all party members (and not merely the leadership) can exercise their rights to select the party candidates and delegates of their choice; and, in the specific

case of Presidential primaries, the rights of persons accepted as members of the same party in other States, and acknowledged by the National Party as members, to have those rights recognized (or denied) well in advance by some previously published standard in the State in which the candidate seeks to participate in the primary election; and, finally, the prospect of an alternative means of ballot access.

All these issues are involved in the "QUESTIONS PRESENTED" by the Petitioner and in his raising such issues as the roles of members of the Florida Legislature, the conduct of the Attorney General, the absence of published standards and criteria, the absence of alternative access to the ballot and, equally serious, the indifference of the District and Appellate Courts in closely scrutinizing the components of this new legislation enacted in 1986 and not previously subjected to judicial review.

Thus this suit concerns not only Petitioner's own Constitutional rights but the Constitutional rights of all Florida Democratic Party members as they sought, and will need to seek, to exercise their own Constitutional rights in future Florida Presidential primary elections when they are confronted with the claims to exclusive monopoly power within the Florida Democratic Party by Florida State officials acting ex officio under a statute which they themselves devised.

EVADING THE "QUESTIONS PRESENTED"

It is patently scandalous that the four principal Respondents are not disposed to have their activities examined by this Court and to avoid this examination they have decided simply not to respond. They have left to the fifth named Respondent the task of substituting a defense on fictitious and extraneous issues which totally avoid and evade the facts and the most fundamental Constitutional issues raised by Petitioner.

Under normal circumstances, this maneuver would subject all five Respondents to sanctions such as those imposed under Rule 11 of the Federal Rules of Civil Procedure for appearing before the judiciary in a frivolous manner.

The Brief in Opposition submitted by the fifth Respondent, who was the least involved in the issues at litigation, reflects the same evasive intent. This Respondent has chosen to omit all comment on the seven "QUESTIONS PRESENTED" as if they were not part of this litigation. Petitioner inquires whether this unusual and evasive response is acceptable to the Justices or whether it affronts and violates the normal rules of proceedings published by this Court

In light of these extraordinary circumstances, Petitioner submits that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit perforce now has to be regarded as amended to include this novel maneuver. It is one additional fundamental issue to be

considered by this Court over and above those previously included in his Petition.

One set of previous fundamental issues concerned Petitioner's complaints against the named Florida State officials. Another set, equally important, was the failure of the Appeals Court, and the lower District Court, to address his specific complaints against the constitutionality of the activities of these Florida State officials and the constitutionality of the Florida statute under which they claimed to be empowered to act.

THE REAL INTENTIONS NOW REVEALED

Consequently, Petitioner asks the Court to consider whether this most recent maneuver, following upon all that preceded it, casts another defining and distinguishing light retroactively on the course of events over the last six years. Does it further reveal the real intent and determination of all the parties concerned: the Florida Attorney General and the Florida Department of Legal Affairs; the Florida Democratic Party; the Florida Legislature controlled by that party; and, most particularly, those Florida State officials who were the leading members of that Legislature which enacted the statute at issue and who thereupon served ex officio on the Presidential Candidate Selection Committee?

Further, have the members of the Florida executive branch, particularly the Florida Attorney General and Florida Department of Legal Affairs, entered into an improper long-term arrangement with the Florida Democratic Party and with the members of the Florida Legislature to subvert the

Constitutional rights of Petitioner and of the general membership of the Florida Democratic Party? –

Finally, does this most recent maneuver represent the intent of the Respondents to try to take advantage of the fact that Petitioner is not a lawyer and is acting Pro Se? In this connection, Petitioner calls attention to the fact that, whereas Esquire Levine stated in his Certificate of Service that he had placed a copy of his Brief into the mail on March 16, the date stamp of the postal service shows that it was mailed on March 21, five days later.

THE THRUST OF RESPONDENT'S ARGUMENTS

Petitioner asks these questions because of the specific arguments made by Attorney Levine, responding on behalf of the Florida Democratic Party.

Respondent argues as if there were some mystical, absolute character to primary elections, as if they were sui generis, a political phenomenon so distinct and so different from all other political activities that they exist in some other legal atmosphere, place and time than all other political actions and that somehow or other none of the Constitutional Articles and Amendments and none of the Federal Statutes apply in any way whatsoever to them, no matter how arbitrary the actions of persons claiming to be the party leaders.

It was such an extravagant claim which resulted in the various Civil Rights laws enacted by the Congress to protect racial minorities, in the affected States, from the denial of their Constitutional rights. The fact that these Civil Rights

laws are Constitutional shows that even primary elections are, in fact, subject to the Constitution. Certainly, if subject when violations take place against "protected classes", they are also subject, at least in some minimal other respects, to the Constitution when serious violations of the rights of the generality of the party members are involved.

Otherwise, the Constitution and the Civil Rights laws would themselves establish racial distinctions rather than, as intended, remove them.

Respondent seeks time and again to seize the very argument which Petitioner had made in contending that the Constitution protects political parties from unwarranted government intrusion and interference. But Respondent cannot accomplish this maneuver because Petitioner has shown conclusively that the Florida Democratic Party suffered precisely this unwarranted intrusion by the actions of the Florida State officials.

Respondent also argues there is no conflict between the decision being appealed in this Petition and the decisions of other Circuits and the Supreme Court. Just as he has resorted, by intentional omission, to suppressing the roles of the Florida State officials, he has omitted from his Table of Authorities all the cases which Petitioner had listed previously as clearly showing contradictory decisions.

Respondent also employs entirely out of context, certainly in Petitioner's case, the claim that Petitioner sought to infringe "on the Democratic Party of Florida's own right of association". He omits, as is his practice to make a point,

that this was a Presidential Primary and that the Florida State officials acting as members of the Presidential Candidate Selection Committee were bound by, but disregarded completely, the published criteria of the National Democratic Party as to how candidates and delegates to the National Convention must be selected. Those criteria explicitly prohibited the considerations used by Respondent to exclude bona fide Democratic Party members because such exclusion was prejudicial to the principles of the National Democratic Party in seeking to hold genuinely democratic primary elections forbidding discrimination by State and local party officials on racial, economic, sexual or ideological grounds. THE ONLY GROUND FOR EXCLUSION WAS MEMBERSHIP IN ANOTHER PARTY.

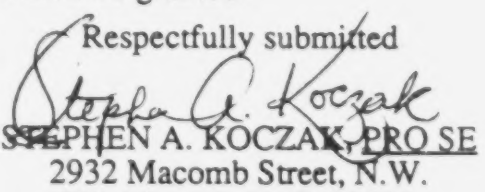
Petitioner was obviously a Democratic Party member, having been on the Florida Democratic Party Presidential primary ballot in 1984 and having been on the New Jersey Fourth Congressional District Ballot in 1986

Respondent here again, as elsewhere, has resorted to a fictitious, extraneous issue to mislead the Court.

CONCLUSION

For all the reasons given above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on the thirteenth day of May, 1992, I placed in the U. S. Postal Service Mail, first class, three copies each of the foregoing Reply Brief to Brief in Opposition to Petition for Writ of Certiorari to George L. Waas, Esquire, Assistant Attorney General, Department of Legal Affairs, THE CAPITOL, Suite 1501, Tallahassee, Florida 32399-1050, Telephone (904) 488-1573 and to John N. French, Esquire, Messer, Vickers, Caparello, French & Madsen, P.O. Box 1876, Tallahassee, Florida 32302-1806, Telephone (904) 222-0720 and to Mark S. Levine, Esquire, 245 East Virginia Street, Tallahassee, Florida 32301, Telephone (904) 222-6580.

Stephen A. Koczak

STEPHEN A. KOCZAK, PRO SE

(In compliance with 28 U.S.C. #1746 and as required by Rule 29.5 (c), there is being left at the same time as this Reply Brief with the Clerk a further Proof of Service in the form of a separate Notarized Statement.)